IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SALES TAX REFERENCE NO.23 OF 1991

IN

REFERENCE APPLICATION NO.70 OF 1983

The Commissioner of Sales Tax)
Maharashtra State, Bombay, having)
his office at 8th floor, Vikrikar)
Bhavan Mazgaon, Bombay - 400 010.)..Applicant.

V/s.

M/s.Roche Products Ltd. having)
their place of business at 28,)
Tardeo Road, Bombay - 400 034.)..Respondent.

Mr.N.P.Deshpande, A.G.P. for the applicant.

Mr.S.S.Gaitonde, Advocate for the respondent.

CORAM : S.RADHAKRISHNAN AND J.P.DEVADHAR, JJ.

DATED : 18TH FEBRUARY, 2005.

ORAL JUDGMENT (PER J.P.DEVADHAR, J.)

1. At the instance of the Commissioner of Sales Tax, Maharashtra State, Bombay, the Maharashtra Sales Tax Tribunal has referred the following questions of law for the decision of this Court under Section 61(1) of the

Bombay Sales Tax Act, 1959 :-

" 1) Whether the Tribunal was correct in law in holding that the impugned sale was effected by transfer of documents of title to the goods after the goods have crossed customs frontiers of India when according to the contract bill of lading itself was taken out in the name of the purchaser M/s.A.Sevantilal & Bros.?

2) Whether on the facts and circumstances of the case, the Tribunal was correct in law in holding that a letter dated 16/7/1971 addressed by the respondent - dealer to M/s.A.Sevantilal & Bros. the purchasers, had the effect of altering or modifying any of the material terms of the original contract of sale dated 30/6/1971, so as to provide completion of sale on presentation of documents ?

3) Whether the Tribunal was correct in law in holding that the said sale was covered by the later part of section 5 (1) of the Central Sales Tax Act, 1956, viz. a sale effected in the course of export by transfer of documents of title to the goods have crossed the customs frontiers of India ? "

2. The reference relates to the assessment period from 1/1/1971 to 31/12/1971.

3. Facts relevant for the purpose of this reference are that the respondent (hereinafter referred to as ‘the assessee’) is in the business of manufacturing medicines and is a registered dealer under the Bombay Sales Tax Act, 1959 [‘BST Act’ for short].

4. On 30/6/1971 the assessee entered into a contract with M/s.A.Shevantilal & Bros. (hereinafter referred to as ‘the buyer’) for sale of 20 tonnes of Beta Ionone (hereinafter referred to as ‘the goods’) at the rate of Rs.67/- per Kg. By a letter dated 16/7/1971 the assessee informed the buyer that the goods would be delivered on board the ship on F.O.B. basis and that the clearing agents of the assessee would handle the consignment in the preparation of shipping documents. It was further stated that the assessee would receive payment by presenting the Bill of Lading and other relevant documents to the buyer or buyer’s bankers. It is not in dispute that the goods in question were put on board the ship on 31.7.1971 and the ship sailed on 12.8.1971. On 13.8.1971 the assessee presented the shipping documents to the buyer’s bankers for payment. According to the assessee, on presentation of the shipping documents on 13/8/1971 the sale was completed by transfer of documents of title and by that time the ship carrying the goods in question had crossed the customs frontiers and, therefore, the transaction was a sale in the course of export as per the second limb of section 5(1) of the Central Sales Tax Act, 1956 [hereinafter referred to as the ‘CST Act’] and thus the sale was exempt from payment of sales tax under

section 75 of the BST Act. The assessee, accordingly, did not include the above transaction in its return and did not pay sales tax.

5. The Sales Tax Officer, however, held that the transaction was a local sale and not a sale in the course of export and, therefore, the assessee was liable to pay sales tax under the BST Act. The assessee filed first appeal against the order of the Sales Tax Officer but the same was dismissed by the Assistant Commissioner of Sales Tax(A). On second appeal filed by the assessee, the Tribunal remanded the case back to the Assistant Commissioner of Sales Tax(A) and directed him to consider the question as to whether the sale was in the course of export by transfer of documents in the light of certain documents which were filed before the Tribunal.

6. On remand, the Assistant Commissioner of Sales Tax (Appeals) considered the evidence produced by the assessee and by his order dated 18/6/1977 held that the transaction was not a sale in the course of export and accordingly confirmed the order passed by the Sales Tax Officer. The assessee once again filed a Second Appeal before the Tribunal. The Tribunal

allowed the appeal filed by the assessee by holding that the transaction was a sale in the course of export by transfer of documents of title, and therefore, not taxable under the B.S.T. Act. On a Reference Application filed by the Commissioner of Sales Tax, the Tribunal has forwarded the aforesaid questions of law for the decision of this Court.

7. Mr.Deshpande, learned advocate appearing on behalf of the applicant submitted that in the present case, the goods were ascertained and appropriated at the time when they were ready for transportation to the docks. As the bill of lading was not in the name of the assessee and the same was in the name of the buyer, he submitted that the title in the goods had passed when the goods were placed on board the vessel. Mr.Deshpande further submitted that as per the terms of the contract the responsibility of the assessee was only in respect of the quality of the goods and the schedule of delivery. Thus, according to the counsel for the applicant the responsibility of the assessee came to an end once the goods were put on board the vessel. The assessee had not reserved the right to divert the goods after they were placed on board the vessel. Thus, the assessee had no control over the goods once they were placed on board the vessel and,

therefore, it was a case of a concluded contract within the State and the assessee was liable to pay sales tax under the BST Act.

8. Mr.Deshpande further submitted that in F.O.B. contracts, the seller's duty is to place the goods "Free on board" on a ship to be named by the buyer. When the seller delivers the goods for loading on board the vessel, he normally obtains the mate's receipt which he transmits to the buyer and the buyer exchanges the said mate's receipt for the proper bill of lading. In this kind of F.O.B. contract, the universal rule is that the property and the risk both pass on shipment as soon as the goods are put over the ship's rails. In this connection, he relied upon the decision of Kerala High Court in the case of **Hindustan Cashew Products (P) Ltd. V/s. S.T.O.** reported in **39 S.T.C. 730**.

9. Counsel for the applicant further submitted that the burden was on the assessee to establish that he was the owner of the goods till the said goods crossed the customs frontiers of India. He submitted that the fact that the drums containing the goods bore the name of the consignee in U.S.S.R. and a sentence in the letter dated 13th August, 1971 addressed by the

assessee to the bankers of the buyer's that - "we send herewith the following documents to be delivered to M/s.A.Sevantilal and Brothers against payment of Rs.1340000/- being the value of goods sold by us to the party" - **(emphasis supplied)** clearly shows that the sale transaction was completed much before 13th August, 1971. He submitted that the fact that the assessee paid for transit insurance of the goods only from the factory to the docks also shows that once the goods were placed on board the ship, it was the responsibility of the buyer to protect the goods. Thus, it is conclusively established that the property and the risk in respect thereof was passed-on to the buyer on placing the goods on board the vessel.

10. Counsel for the applicant further submitted that the unilateral letter of the assessee dated 16th July, 1971 is of no consequence, because the declaration made therein was not assented to or approved by the buyer. Moreover, from the sale invoice dated 30th July, 1971 it is clear that the payment was not intended against any transfer of document but the same was against letter of Credit No.142069 through the Bank of India. He submitted that the assessee had raised the debit for the value of the goods against the buyer on the date of shipment

as the buyer had not furnished form No.14. They collected purchase tax because the sale was complete on shipment. He submitted that there is nothing on record to show that the assessee had retained the right to divert the goods and there is no express term in the contract to the effect that the property in goods shall pass only on presentation of documents and receipt of money. Accordingly, the counsel submitted that the question referred by the Tribunal be answered in favour of the revenue and against the assessee. Mr.R.A.Harpale, Assistant Commissioner of Sales Tax, Bombay assisted the court by submitting that in the present case once the goods were placed on board the vessel as per the terms of the contract, the sale was complete by appropriation and it could not be said that on presentation of documents of title for payment there was sale by transfer of documents of title as contemplated in the second limb of Section 5(1) of the Central Sales Tax Act. In support of his contention, he relied upon the decisions of the Apex Court in the case of **Ben Gorm Nilgiri Plantation Co. V/s. S.T.O. (15 STC 753), Mod. Serajuddin V/s. State of Orissa (36 STC 136 S.C.) and Murarilal Sarawagi V/s. The State of Andhra Pradesh (39 STC 294)**. He also relied upon the decision of the Andhra Pradesh High Court in the case of **Rajendra Oil Mill and Refinery V/s. State**

of Andhra Pradesh (97 STC 192) and the decision of the Madras High Court in the case of **Seshasayee Paper & Board V/s. Deputy Commercial Tax Officer (56 STC 8).**

11. Mr.Gaitonde, learned advocate appearing on behalf of the respondent submitted that at the relevant time, the expression "crossing the customs frontiers of India" was not defined under the Central Sales Tax Act. However, the Apex Court in the case of **State of Madras V/s. Davar & Co.** reported in **24 S.T.C.481** held that the customs frontiers means boundaries of territories including territorial waters of India. He submitted that in the present case, since the transfer of documents of title took place after the goods had crossed the customs frontiers of India, as per the ratio laid down by the Apex Court in the case of Davar & Co. (supra), the transaction was a sale in the course of export falling under the second limb of Section 5(1) of the Central Sales Tax Act and, therefore, exempted. He submitted that although the documents of title were taken out in the name of the buyer, they were delivered to the buyer only against the payment after the goods had crossed the customs frontiers which meant that the assessee had reserved its right of disposal till after the goods had crossed the customs frontiers of India. In

the light of the decision of the M.P. High Court in the case of **Hindustan Steel Limited Bhilai Steel Plant V/s. The State of Madhya Pradesh & Others [50 S.T.C. 287]** and the decision of the Madras High Court in the case of **Deputy Commissioner (C.T.) Coimbatore V/s. Salem Magnesite (P) Limited [42 S.T.C. Page 285],** the counsel for the respondent submitted that the sale was in the course of export and the sales tax under B.S.T. Act was exempted.

12. Mr.Gaitonde strongly relied upon the decision of this court in the case of **Daulatram Rameshwarlal V/s. B.K. Wadeyar** reported in **8 STC 617** which has been upheld by the Apex Court (see 11 STC 757). In the light of the aforesaid decision, Mr.Gaitonde submitted that where the sale is on F.O.B. basis, the sale is complete on the date on which the documents of title to the goods are handed over to the buyer or to the bankers of the buyer. In the present case, admittedly, on 13/8/1971 when the document of title were tendered for payment the goods were beyond the customs frontiers of India and, therefore, it must be held that on presentation of the documents of title on 13/8/1971, the sale was concluded by transfer of documents of title in the course of export, which is exempt from payment of sales tax under the BST Act.

He submitted that various decisions of the Apex Court and the High Court relied upon by the revenue are distinguishable on facts because in all those cases, the sale effected by transfer of documents of title after the goods have crossed the customs frontiers of India was not an issue for consideration. Accordingly, Mr.Gaitonde submitted that in the light of the decision of the M.P. High Court in 50 S.T.C. 287, decision of the Madras High Court in 42 S.T.C. 285 and the decision of the Apex Court in the case of B.K. Wadeyar (supra) the questions raised in the reference be answered in favour of the assessee.

13. We have carefully considered the rival submissions. The basic issue involved in this reference is, whether the sale of goods in question is effected by transfer of documents of title to the goods after the goods had crossed the customs frontiers of India so as to constitute ‘sale in the course of export’ within the meaning of section 5 of the CST Act. Section 5 (1) of the CST Act reads as under :-

> 5. **When is a sale or purchase of goods said to take place in the course of import or export -**

> 1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed customs frontiers of India.
>
> 2) .....
>
> 3) .....

Thus, under section 5(1) of the CST Act the deeming fiction of ‘sale in the course of export’ is available only in respect of two categories set out therein, namely, (one) where the sale or purchase itself occasions such export and (two) where the sale is effected by transfer of documents of title after the goods have crossed the customs frontiers of India.

14. According to the assessee, the transaction in question falls in the second category i.e. sale effected by transfer of documents of title after the goods have crossed the customs frontiers of India.

15. To constitute ‘sale of goods in the course of export’ within the meaning of the second limb of section 5(1) of the CST Act, two conditions are required to be satisfied. They are, (one) the sale

must be effected by transfer of documents of title to the goods and (two) transfer of documents must be effected after the goods have crossed the customs frontiers of India. Therefore, the first question to be considered in the present case is, whether the sale is effected by transfer of documents of title to the goods.

16. Section 2(g) of the CST Act defines 'sale' to mean any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration. Thus, under the CST Act sale takes place on transfer of property in goods even though the payment is deferred. In a transaction, at what point of time the transfer of property in goods can be said to have taken place has to be determined from the terms of the respective contract.

17. In the present case, from the terms of the contract contained in the letter dated 30th June, 1971 and 16th July, 1971 it is seen that the transaction related to sale of 20 tonnes of Beta Ionone. The terms set out therein specifically provide for the quantity, quality, price, mode of delivery and the terms of payment in respect of the goods agreed to be

sold. Although the assessee agreed to deliver the goods on F.O.B. basis on board the vessel suggested by the buyer, it was specifically stated in the letter dated 30th June, 1971 that the cost of onward shipment shall be on the buyer. In other words, the cost of transportation after the goods were placed on board the vessel was to be borne by the buyer, because, under the contract the obligation of the assessee came to an end once the goods were delivered on board the vessel. In the letter dated 16th July, 1971, it was further clarified that the assessee would cover transit insurance of the goods only from the factory till the goods were put on board the vessel meaning thereby it was the responsibility of the buyer to take transit insurance from the time the goods were placed on board the vessel till it reaches the destination. These terms clearly show that the intention of the parties under the contract was that the property and the risk in the goods would vest in the buyer as soon as the goods were placed on board the vessel. In this connection, we refer to the decision of the Apex Court in the case of **Agricultural Market Committee V/s. Shalimar Chemicals Works Ltd.** reported in **(1997) 5 S.C.C. 516**, relevant portion of which reads thus :-

> " In the instant case, the goods which were the subject-matter of sale were ascertained goods. They were also in a deliverable state. On the order being placed by the respondent, the seller in the State of Kerala, loaded the goods on the lorry and despatched the same to Hyderabad. It is at this stage that the conduct of the parties becomes extremely relevant. It was one of the terms of the contract between the parties that the seller would not be liable for any future loss of goods and that the goods were being despatched at the risk of the respondent. The respondent had also obtained insurance of the goods and had paid the policy premium. He, therefore, intended the goods to be treated as his own so that if there was any loss of goods in transit, he could validly claim the insurance money. The weighment of the goods at Hyderabad or the collection of documents from the bank or payment of price through the bank at Hyderabad were immaterial, inasmuch as the property in the goods had already passed at Kerala and it was not dependent upon the payment of price or the delivery of goods to the respondent.

Thus, in the facts of the present case, it is established that on delivery of goods on board the vessel, the property and the risk in the goods passed in favour of the buyer and thus the sale was complete on delivery of goods on board the vessel and not on delivery of documents of title.

18. In the present case, admittedly, the sale transaction between the assessee and the buyer did not occasion export. The export was effected by the buyer pursuant to the contract entered into by and between the buyer and the foreign purchaser. The transaction under the two contracts, were separate, independent

and wholly unconnected. The fact that the assessee had voluntarily agreed to deliver the goods on board the vessel, the fact that the assessee had agreed to assist the buyer in the preparation of documents of title such as Bill of Lading and the fact that the assessee agreed to receive payment on tendering the documents of title does not mean that the property in goods continued to vest in the assessee even after the goods were placed on board the vessel. All these obligations were under the terms of the contract in which there was no element of export. In other words, merely because the assessee helped the buyer in taking out the bill of lading and agreed to receive payment on presentation of bill of lading, it cannot be construed to mean that the property in goods would continue to vest in the assessee till the presentation of documents of title for payment. As stated earlier, from the terms of the contract it is evident that on delivery of goods on board the vessel, the property in goods vest in the buyer and not thereafter.

19. The fact that the assessee delivered the goods on board the vessel in the F.O.B. form and received the payment of price only thereafter does not affect the fundamental position under the contract that on delivery of goods on board the vessel, the

property in goods shall vest in the buyer. The Apex Court in the case of **Murarilal Sarawagi V/s. The State of A.P. [39 S.T.C. 294 at 298]** has observed thus :-

> " In f.o.b. contracts the seller's duty is to place the goods "free on board" a ship to be named by the buyer. When the seller delivers the goods for loading on board he normally obtains a mate's receipt which he transmits to the buyer and the buyer exchanges this for the proper bill of lading. In this sort of f.o.b. contract the almost universal rule is that property and risk both pass on shipment as soon as the goods are over the ship's rail and if it should be material, the property and risk in each part of the cargo will pass as it crosses the ship's rail. The loading of the goods is an unconditional appropriation which passes the property. This is not because of any peculiarity of f.o.b. contracts but because in this type of contract the seller's duty is to deliver the goods f.o.b. Once they are on board the seller has delivered them to the buyer and it is natural that they should thereafter be at the buyer's risk."

In the facts of the present case, there is nothing on record to show that the property in goods was to pass in favour of the buyer only presentation of the documents of title for payment. On the contrary, the terms of the contract clearly show that the property in goods were to pass on delivery of goods on board the vessel. Therefore, receipt of payment on presentation of documents of title does not

in any way affect the completion of sale by transfer of property in goods on delivery of goods on board the vessel.

20. The decision in the case of Daulatram Rameshwarlal (supra) which is strongly relied upon by the assessee is distinguishable on facts for more than one reason. Firstly, the decision in Daulatram's (supra) was rendered under the unamended Article 286 of the Constitution, whereas the case in hand pertains to the transaction rendered after the amendment to Article 286 of the Constitution. Secondly, the decision in Daulatram's case was rendered before the enactment of the CST Act, whereas in the present case we are concerned with the applicability of CST Act to the transaction in question. Thirdly, the decision in Daulatram's case was rendered in the absence of the definition of 'sale of goods in the course of export', whereas in the present case we are called upon to consider as to whether the transaction in question falls within the definition of 'sale in the course of export' contained in section 5(1) of the CST Act. Thus, the questions raised in the reference before us have to be answered in the light of the provisions of the CST Act and not by applying the ratio laid down by the Apex Court in the Daulatram's case which was

rendered before the enactment of the CST Act.

21. The contention of the assessee that on presentation of documents of title for payment, sale was effected by transfer of documents of title is also without any merit. The assessee was the owner of the goods and the title in the goods always vested in the assessee. On preparation of the bill of lading in the name of the buyer, complete and defeasible title in the goods vests in the buyer (see Apex Court decision in the case of Swaika Oil Mills, 40 S.T.C. at 369). It is not in dispute that in the bill of lading the buyer was shown as consignor and the foreign purchaser was shown as consignee. It is also not in dispute that the immediate cause for movement of the goods from the factory to the decks for export was not the contract between the assessee and the buyer, but the contract between the buyer and the foreign purchaser. Further, there is no evidence on record to show that the assessee had retained the control over the goods after the same were delivered on board the vessel. Once the goods were placed on board the vessel, the property in goods, the risk as also the title vested in the buyer. Neither the assessee had title to the goods under the documents of title nor the assessee could transfer any title to the goods under the

documents of title. In these circumstances, mere handing over the documents of title for payment cannot be said to constitute sale by transfer of documents of title especially when as per the terms of the contract, the property and risk in the goods had passed in favour of the buyer as soon as the goods were placed on board the vessel. In our opinion, the Tribunal committed an error in presuming that the right in the goods and the property in the goods continued to vest in the assessee till the documents were delivered against payment.

22. Strong reliance was placed by the learned counsel for the respondent on the decision of the Madras High Court in the case of Salem Magnesite (P) Ltd. (supra) and the decision of the M.P. High Court in the case of Hindustan Steel Ltd. (supra). The ratio laid down in both the aforesaid decisions are not applicable to the facts of the present case, because, in both the aforesaid cases there was a specific terms in the agreement to the effect that the ownership of the goods will pass to buyer therein only on the seller handing over the bill of lading after the goods have left the shares of India. In view of the above specific terms contained of the contract, it was held in those cases that the ownership of the

goods vested in the seller till the goods crossed the customs frontiers of India. In the present case, as stated hereinabove from the terms of the contract, it is clearly seen that the property and the risk in the goods vested in the buyer as soon as the goods were delivered on board the vessel. In fact, the decision of the Madras High Court in the case of Salem Magnasite(P) Ltd.(supra) has been distinguished by the Madras High Court itself subsequently in the case of **Seshasayee Paper and Board Ltd. V/s. Deputy Commercial Tax Officer, Thiruchengode, Salem District** reported in **56 S.T.C. 8**.

23. For all the aforesaid reasons, we hold that in the present case the sale was not effected by the transfer of documents of title after the goods have crossed the frontiers of India but in fact the sale was effected as soon as the goods were delivered on board the vessel and, therefore, the sale was not covered by the second limb of section 5(1) of CST Act, 1956. Accordingly, we answer all the three questions in the negative i.e. in favour of the Revenue and against the assessee.

24. Before closing, we would like to place on record the valuable assistance rendered to the court

by Mr.R.A. Harpale, Assistant Commissioner of Sales Tax.

25. The reference is disposed of in the above terms, however, with no order as to costs.

sd/-

(S.RADHAKRISHNAN, J.)

sd/-

(J.P. DEVADHAR, J.)